IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
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CLERK-ALBUQUERQUE

SALLY C. OLINGER,

Plaintiff,

vs.

No. CIV-01 1403

LESLIE C. SMITH
WILLIAM W. DEATON
MLK

ADECCO EMPLOYMENT SERVICES, INC., d/b/a/ ADECCO, a Delaware corporation,

Defendant.

NOTICE OF REMOVAL

Defendant Adecco Employment Services, Inc. ("Adecco"), hereby gives notice of the removal to this Court pursuant to 28 U.S.C. § 1441, of the above-captioned action, formerly pending in the District Court for the Second Judicial District, County of Bernalillo, State of New Mexico, as No. CV-200100718. In support thereof, Adecco states as follows:

1. On January 31, 2001, Plaintiff Sally C. Olinger filed a civil complaint against Adecco in the Second Judicial District Court for the State of New Mexico entitled *Sally C. Olinger v. Adecoo Employment Services, Inc., d/b/a Adecco, a Delaware corporation*, no. CV-200100718. True and correct copies of the documents served by Plaintiff in this matter are attached hereto as Group Exhibit A.

2. The complaint alleges that Adecco terminated Plaintiff's employment on the basis of her age, in violation of the New Mexico Human Rights Act and that as a result Plaintiff suffered loss of income (back pay and front pay), employment benefits, "other pecuniary losses," and emotional distress. Complaint, ¶¶ 27, 28, 29. The Complaint also seeks attorneys' fees, costs, pre-

judgment and post-judgment interest, "and for such other and further relief as the Court deems appropriate."

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. There is complete diversity of citizenship as to all parties, and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

4. Defendant has, pursuant to 28 U.S.C. ¶ 1446(a), attached hereto, as Group Exhibit A, all the state court process, pleadings and orders served upon it. This Notice of Removal is filed within 30 days after receipt by Adecco of a copy of "an amended pleading motion, order or other paper from which it may first be ascertained that the case is one which is or has become removeable" in compliance with 28 U.S.C. § 1446(b). *See* transcript of Deposition of Sally Olinger, at 206-07, attached hereto as Exhibit B.

Complete Diversity of Citizenship Exists

5. Plaintiff Sally C. Olinger is a resident of Albuquerque, Bernalillo County, New Mexico. Complaint, ¶ 1.

6. Defendant Adecco is a Delaware corporation with its principal place of business in Melville, New York. Complaint, ¶ 2.

7. Thus, there is complete diversity of citizenship between all parties hereto.

The Amount in Controversy Requirement is Satisfied

8. To confer subject matter jurisdiction on this Court based on diversity of citizenship, the amount in controversy must exceed the sum or value of $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a), as amended. Where a complaint does not contain dispositive allegations of the amount in controversy, the jurisdictional amount is determined by the allegations in the underlying

complaint. *See, e.g., Laughlin v. K-Mart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). Calculations of the amount in controversy includes both compensatory and punitive damages. *See, e.g., Bell v. Preferred Life Assur. Soc. of Montgomery, Alabama,* 320 U.S. 238, 240 (1943); *Watson v. Blankenship*, 20 F.3d 383, 386 (10th Cir. 1994).

9. Plaintiff seeks lost back and front pay, employment benefits, emotional distress damages, and unspecified "other compensatory damages." Complaint, ¶ 22. Plaintiff also seeks an award of attorneys' fees. Id., ¶ 23. Although Adecco served an Interrogatory on Plaintiff, asking her if she was seeking more than $75,000 in damages in this case, Plaintiff refused to commit, one way or another, stating "Final computation of Damages have not been completed at this time." At her deposition, however, Plaintiff answered the following questions as follows:

Q: As you sit here today, do you think your damages – that your emotional distress is worth less than $75,000?

A: No.

Q: As you sit here today, do you think your damages, what you have suffered, is worth less than $75,000?

A: No.

Sally Olinger Dep., at 206-07, attached hereto as Exhibit B. Thus, Plaintiff now admits that there is more than $75,000 in controversy in the present case. The transcript of Plaintiff's deposition is an "other paper from which it may first be ascertained" that the case is or has become removable. Huffman v. Saul Holdings Limited Partnership, 194 F.3d 1072, 1078 (10th Cir. 1999) (adopting majority rule that testimony during deposition constitutes an "other paper" within the meaning of 1446(b)); see also, S.W.S. Erectors, Inc. v. Infax, 72 F.3d 489, 494 (5th Cir. 1996) (deposition constituted a new paper or event that changed the facts regarding the removableness of the case).

10. Because the amount in controversy requirement is plainly met here, and, as shown above, there is complete diversity of citizenship between the parties, and this notice is being filed within a year after the commencement of this action, removal of this case to this Court is appropriate. Cf. O'Bryan v. Chandler, 496 F.2d 403 (10th Cir.) (noting that § 1446 (b) authorizes second petitions for removal), cert. denied, 419 U.S. 986 (1974).

WHEREFORE, because there is complete diversity of citizenship between the parties and the amount in controversy exclusive of interest and costs is in excess of $75,000, Defendant Adecco Employment Services, Inc. respectfully requests this honorable Court to assume full jurisdiction over this action as provided by law.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: Lisa Mann

Lisa Mann
Jennifer A. Noya
Attorneys for Adecco Employment Services, Inc.
Post Office Box 2168
Bank of America Centre, Suite 1000
500 Fourth Street, N.W.
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to the District Court Clerk, Second Judicial District, State of New Mexico and upon counsel for Plaintiff, J. Edward Hollington, 708 Marquette Avenue, N.W., Albuquerque, New Mexico 87102-2035, this 13th day of December, 2001.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: Lisa Mann
Lisa Mann

W0203443.WPD

ENDORSED
FILED IN MY OFFICE THIS
JAN 31 2001
CLERK DISTRICT COURT
DEAN DUNSWORTH

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

SALLY C. OLINGER,

Plaintiff,

v. No. CV-2001 00718

ADECCO EMPLOYMENT SERVICES,
INC., d/b/a ADECCO, a Delaware corporation,

Defendant.

APPEAL AND COMPLAINT UNDER THE
NEW MEXICO HUMAN RIGHTS ACT

COMES NOW, Plaintiff, Sally C. Olinger, hereinafter "Ms. Olinger", by and through her attorney of record, J. Edward Hollington & Associates, P.A., J. Edward Hollington, and for her complaint states:

I.
JURISDICTION

1. Plaintiff, Ms. Olinger, is a resident of Albuquerque, Bernalillo County, New Mexico.

2. Adecco is a Delaware corporation which is registered with New Mexico Public Regulatory Commission as a foreign corporation, and has business locations in Albuquerque, Bernalillo County, New Mexico.

3. Plaintiff files this appeal and complaint pursuant to NMSA 1978 § 28-1-13 [1987].

4. At all times material, Defendant Adecco had four (4) or more persons employed as required by NMSA 1978 § 28-1-2B [1987].

EXHIBIT
A

II.
STATEMENT OF FACTS

5. Ms. Olinger was hired as an office supervisor in the Albuquerque office of Adecco on June 6, 1999.

6. Ms. Olinger was recruited for the position of office supervisor by Vincent Marizio, then Vice-President of Albuquerque and Rio Rancho Adecco offices.

7. Vincent Marizio was a representative of Adecco, and asked Ms. Olinger if her daughter, Elizabeth [Beth] Barela, would be interested in joining the office team of the Albuquerque office of Adecco.

8. Vincent Marizio, an agent and representative of Adecco, hired Elizabeth [Beth] Barela to work in the Adecco Albuquerque office.

9. Ms. Olinger performed her job duties satisfactorily and received favorable evaluations and a raise and bonus during her employment.

10. Ms. Olinger's supervisor was Georgia Montoya, Branch Manager of Adecco.

11. On June 19, 2000, the Branch Manager, gave Ms. Olinger a written notice that she was terminated from her job.

12. The written notice contained a statement that Ms. Olinger was terminated because of a "restructuring of your branch".

13. There was no restructuring of the branch office where Ms. Olinger worked on or about June 19, 2000.

14. Ms. Olinger was born July 20, 1939.

15. Ms. Olinger was the only employee terminated from the branch office of Adecco where she worked around the time of June, 2000.

16. During Ms. Olinger's employment with Adecco, age-bias statements were made by the Branch Manager against Ms. Olinger that: "She's older--harder for her to catch on", "Beth has to carry her mom--because her attention to detail is not there", "She's too old to catch on".

17. After Ms. Olinger was fired, she was replaced by Dana Zimmerly, who was under thirty (30) years of age.

18. Ms. Olinger was never offered any other available positions with Adecco after notice of her termination.

19. Ms. Olinger filed a charge of age discrimination with the EEOC and the New Mexico Department of Labor, Human Rights Division on June 29, 2000, as Charge No. 390A00940.

20. On January 9, 2001, the New Mexico Department of Labor, Human Rights Division issued its Order of Non-Determination to Ms. Olinger.

21. Ms. Olinger has complied with all administrative requirements for asserting her claim of age discrimination under the New Mexico Human Rights Act.

22. Ms. Olinger has lost income [back pay, front pay], benefits, and has experienced emotional distress since the date of her termination and other compensatory damages.

23. Ms. Olinger has incurred attorney fees and costs in bringing this action.

III.
VIOLATIONS OF NEW MEXICO HUMAN RIGHTS ACT

24. Plaintiff hereby realleges and incorporates the above paragraphs 1 through 23 as if fully set forth herein.

25. Ms. Olinger is a member of a protected group because of her age.

26. Ms. Olinger was qualified for and satisfactorily performed her job as office supervisor.

27. Adecco's termination of Ms. Olinger's employment was an adverse employment action.

28. Adecco's decision to terminate Ms. Olinger's employment was motivated by her age.

29. Ms. Olinger has lost income [back pay, front pay], benefits, other pecuniary losses, and suffered emotional distress as a result of her termination.

30. Adecco intentionally violated Ms. Olinger's rights under the New Mexico Human Rights Act.

31. Adecco's actions against Ms. Olinger violate NMSA 1978 § 28-1-7A [1995].

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in her favor and against Defendant, and award Plaintiff her actual damages, including but not limited to, loss of income [back pay, front pay], benefits, and damages for emotional distress and other losses. In addition, Plaintiff asks the Court to award her reasonable attorney fees and costs, and pre-judgment and post-judgment interest on her actual damages, and for such other and further relief as the Court deems appropriate.

Respectfully submitted:

J. Edward Hollington & Associates, P.A.

J. Edward Hollington
Attorney for Plaintiff
708 Marquette, NW
Albuquerque, New Mexico 87102
(505) 843-9171
(505) 843-7027

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

SALLY C. OLINGER,

Plaintiff,

v. No. CV 2001 00718

ADECCO EMPLOYMENT SERVICES, INC., d/b/a ADECCO, a Delaware corporation,

Defendant.

SUMMONS

TO: Adecco Employment Services, Inc., d/b/a Adecco
c/o CT Corporation
123 Marcy
Santa Fe, NM 87501

Defendant(s), Greeting:

You are hereby directed to serve a pleading or motion in response to the Appeal from Human Rights Division within 30 days after service of the Summons, and file the same, all as provided by law.

You are notified that, unless you so serve and file a responsive pleading or motion, the Plaintiff(s) will apply to the Court for the relief demanded in the Appeal from Human Rights Division.

Attorney or Attorneys for Plaintiff: J. Edward Hollington
Address: 708 Marquette Avenue, N.W.
Albuquerque, NM 87102-2035
(505) 843-9171

WITNESS the Honorable ~~ROBERT H. SCOTT~~ W. Daniel Schneider District Judge of said Court of the State of New Mexico and the Seal of the District Court of said County, this ______ day of JAN 31 2001, 2001.

BENNINA ARMIJO-SISNEROS
CLERK OF THE DISTRICT COURT

(SEAL)

By: DEAN DUNSWORTH
Deputy

NOTE: This summons does not require you to see, telephone or write to the District Judge of the Court at this time. It does require you or your attorney to file your legal defenses to this case in writing with the Clerk of the District Court within 30 days after the summons is legally served on you. If you do not do this, the party suing may get a Judgment by default against you.

IF YOU WANT THE ADVICE OF A LAWYER AND DON'T KNOW ONE, YOU MAY WISH TO CALL THE ALBUQUERQUE BAR ASSOCIATION LAWYER REFERRAL SERVICE AT 243-2615, OR THE STATE BAR STATEWIDE LAWYER REFERRAL SERVICE AT 842-6132

Revised 1/1/83 C 4.45-S

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

June 04, 2001 16:57

CLERK

US District Court
District of New Mexico
Digital File Stamp

Case:	**01cv00270**
Title:	**Olinger v. Adecco Employment**
Document Type:	**Memorandum Opinion and Order**
Document Number:	**14**
Description:	**MEMORANDUM, OPINION, AND ORDER: by District Judge C. LeRoy Hansen granting pltf's motion to remand this matter to Second Judicial District Court [9-1] remanding case to state court (cc: all counsel*)**
Court Signature:	1e d6 73 d6 a8 89 9d e6 37 61 6a ff 4e 57 fc 42 21 0f 56 6a c6 76 90 09 57 d0 ed c9 fd 4c db e7 53 de ca 63 5b da ad d6 9e 2b aa 78 f7 be 26 3b da 90 5c 3c 94 f8 d5 7d 3b ea 08 fa cf bc ed d7

This document constitutes an official file stamp of the Court and, if attached to the document identified above, serves as an endorsed copy of the pleading. It may be used in lieu of the Court's mechanical file stamp for the named document only, and misuse will be treated the same as misuse of the Court's official mechanical file stamp. The Court's digital signature is a verifiable mathematical computation unique to the filed document and the Court's private encryption key. This signature assures that any change can be detected.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SALLY C. OLINGER,

Plaintiff,

v. **CIV No. 01-270 LH/DJS-ACE**

ADECCO EMPLOYMENT SERVICES, INC., d/b/a/ ADDECCO, a Delaward corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiff's Motion to Remand (Docket No. 9). Having reviewed the pleadings filed in this case and the applicable law, I conclude that I lack subject matter jurisdiction and must remand this case to the Second Judicial District Court, County of Bernalillo, State of New Mexico.

Background

On January 31, 2001, Plaintiff filed her complaint in the Second Judicial District Court, County of Bernalillo, State of New Mexico, asserting claims for age discrimination under the New Mexico Human Rights Act. Plaintiff requested various types of damages, in an unspecified amount.

On March 1, 2001, Defendant filed its notice of removal under 28 U.S.C. § 1441. This notice alleges that it was filed within thirty (30) days of receipt by Defendant of a copy of the complaint, in compliance with 28 U.S.C. § 1446(b). The notice also states that complete diversity of citizenship exists and that this Court has diversity jurisdiction over this case.

In the notice of removal, Defendant notes the jurisdictional requirement of $75,000, and states that because Plaintiff seeks lost front and back pay, employment benefits, emotional distress damages, and unspecified "other compensatory damages," as well as attorneys' fees, "there is obviously more than $75,000 in controversy in the present case." (Not. of Rem. at ¶ 9). In support of this conclusion, Defendant lists several recent employment cases, wherein damages of more than $75,000 were awarded. Beyond the basic characterization of these "employment cases," and a mention of the damages awarded in each, Defendant gives no factual basis to connect the cited cases to this case. Defendant then makes the conclusory statement that "the amount in controversy requirement is plainly met." *Id.* at ¶ 10.

Legal Standards

When a case is removed, it is the defendant's burden to establish the amount in controversy. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. (1995). Federal court jurisdiction is to be strictly construed. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). There is a presumption against removal jurisdiction. *Laughlin* at 873. The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. *Id.* When the face of the complaint does not affirmatively establish the requisite amount in controversy, the burden is on the removing party to set forth, in the notice of removal itself, underlying facts supporting the assertion that the minimum jurisdictional amount for diversity jurisdiction exists. *Id.* The notice of removal must contain a short and plain statement of the grounds for removal, 28 U.S.C. § 1446(a), and must establish the requisite amount in controversy at the time of removal by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp 1188, 1190 (N.D.Ok. 1996).

Defendant contends that the notice of removal's recitation of recent employment cases, in which verdicts of more than $75,000 were awarded, supports its assertion that the jurisdictional requirement has been met here. In making this argument, Defendant partially relies upon the personal injury automobile accident case of *Marrujo v. Swift Transportation Co., Inc.*, CIV No. 98-122 (D. N.M. Aug. 6, 1999) (mem.). In that case defendant analogized between plaintiff's alleged personal injuries and jury verdicts in cases with similar alleged personal injuries. In *Marrujo*, Judge Black held that such an analogy was sufficient, stating: "It appears to the Court that [Defendant] had a factual basis upon which to make such an assertion [of removal jurisdiction], and it set out those facts in the Notice of Removal." *Id.* It is in this material respect that the *Marrujo* case is distinguishable from this case: the *Marrujo* defendant analogized to jury verdicts in other vehicular accident cases with similar physical injuries, providing a factual basis for comparison and analogy. Here, although Defendant cites to other cases that awarded damages for lost income and the like, Defendant gives the Court no underlying factual basis upon which it could conclude that the cited cases are indeed analogous to this case, except that they are all employment cases, seeking the usual types of damages in employment cases. Specifically, Defendant provides no factual basis as to any supposed similarity in lost compensation, pay, benefits, length of employment or circumstances of termination[1]. Without any underlying facts, the Court can only speculate as to how similar or analogous the cited employment cases are to this case. By simply citing to these other cases, Defendant has not met its burden under *Laughlin*.

Conclusion

The "amount in controversy" involves an inquiry into what the Plaintiff potentially stands to gain from a lawsuit, or what the Defendant's possible exposure to liability may be. *See* 15 MOORE'S FEDERAL PRACTICE, § 102.109[1] (3d ed. 2000); *Carnahan v. Southern Pacific R.R. Transp. Co.*, 914 F. Supp. 1430 (E.D. Tex. 1995). Based on the contents of the complaint and the notice of removal, the Court finds no underlying facts that would support a conclusion that this case involves a dispute of $75,000 or more. All we know from these two pleadings is that Plaintiff claims that she was dismissed for reasons related to her age and that she claims damages typical to this type of lawsuit.

Defendant's citing the Court to employment cases that awarded typical categories of damages in amounts over $75,000 does not satisfy its burden to establish that Plaintiff has the potential to gain $75,000 or more from this lawsuit. If this approach were sufficient, defendants could always meet the burden, because for virtually every type of case, one could cite other cases where the same categories of damages have been awarded in excess of $75,000. This Court is bound by the Tenth Circuit precedent in the *Laughlin* case. That precedent requires a stated factual basis upon which this Court can conclude that the minimum jurisdictional amount for

[1] Defendant notes in its response brief that Plaintiff was earning $30,000 at the time of her termination and submits a Personnel Action Form to attempt to substantiate this statement. This late submission does not satisfy the requirement that the amount in controversy be established by the complaint or by the notice of removal. Proof of the amount in controversy is insufficient if submitted in documents subsequent to the notice of removal. *Laughlin* at 873.

diversity jurisdiction exists. This requirement must be met on a case-by-case basis, with facts presented to the Court that are specific to that case. Defendant has not met this requirement.

WHEREFORE, for the reasons stated above, Plaintiff's Motion to Remand shall be **granted**, and this case shall be remanded to the Second Judicial District Court, County of Bernalillo, State of New Mexico.

IT IS SO ORDERED.

LeRoy Hansen

UNITED STATES DISTRICT JUDGE

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF MEXICO

SALLY C. OLINGER,

Plaintiff,

v. No. CV-2001 00718

ADECCO EMPLOYMENT SERVICES, INC.,
d/b/a ADECCO, a Delaware Corporation,

DEPOSITION OF SALLY OLINGER

December 3, 2001
10:00 a.m.
at the law offices of Modrall, Sperling, Roehl, Harris
& Sisk, PC
500 Fourth Street, NW - 10th Floor
Albuquerque, New Mexico 87102

PURSUANT TO THE NEW MEXICO RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: LISA MANN, ESQ.
ATTORNEY FOR DEFENDANT

REPORTED BY: MARGARET N. GURULE
CCR #113
KAREN RODRIGUEZ
CCR # 55
Paul Baca Court Reporters, Inc.
500 Fourth St., NW - Suite 105
Albuquerque, New Mexico 87102

EXHIBIT
tabbies
B

Page 206

Q. Do you think your case is worth less than that?
A. I don't think I can make a judgment on that right now.
Q. What would it take for you to be able to make a judgment?
A. I'm not going to make that right now. I'm going to work that out with my attorney.
Q. How are you going to work that out with him?
A. With how he just explained it to you.
Q. Well, he said you're going to supplement. I understand you've got a duty to do that. I'm asking you: What do you need to know --
A. I'm not an attorney or an economist.
Q. Okay. So you need an economist to tell you what your claim is worth?
A. Some assistance, yes.
Q. If I asked you in front of a jury, "What do you think your emotional distress is worth?" if you had to put a dollar figure on it -- that's all we can do. A jury can't make you feel better -- what are you going to say to them?
A. I'll cross that bridge when I come to it.
Q. As you sit here today, do you think your

Page 207

damages -- that your emotional distress is worth less than $75,000?
A. No.
Q. As you sit here today, do you think your damages, what you have suffered, is worth less than $75,000?
A. No.
MS. MANN: I have no further questions.
MR. HOLLINGTON: Let me ask you one follow-up question, just to clarify.

EXAMINATION

BY MR. HOLLINGTON:
Q. You used the date of 1999 regarding emotional distress and seeking care with Dr. -- I think it's --
A. Arndell.
Q. Arndell. Was that a correct date, 1999? Your termination we know was June of 2000.
A. So it would have been after that.
Q. All right. I just wanted to get that clear. You were asked questions about damages here recently. Are you prepared at this point to state any value that you think your case is worth today?
A. No. I'm not willing to state that at this time.

Page 208

Q. As you stated, you will rely on expertise and consultation with your attorney before that decision is made?
A. Yes.
MS. MANN: Objection to the form of the question as leading.
MR. HOLLINGTON: That's okay. You can answer the question. She's doing that for the record.
THE WITNESS: Shall I answer the question?
MR. HOLLINGTON: You did. You answered it.
THE WITNESS: Thank you.
MR. HOLLINGTON: That's all the questions. We'll read and sign.
(Proceedings concluded.)

Page 209

SALLY OLINGER v. ADECCO EMPLOYMENT, INC.

WITNESS SIGNATURE/CORRECTION PAGE

If there are any typographical errors to your deposition, indicate them below:

PAGE LINE
______ Change to __________
______ Change to __________
______ Change to __________
______ Change to __________

Any other changes to your deposition are to be listed below with a statement as to the reason for such change.

PAGE LINE CORRECTION REASON FOR CHANGE

I, SALLY OLINGER, do hereby certify that I have read the foregoing pages of my testimony as transcribed and that the same is a true and correct transcript of the testimony given by me in this deposition on December 3, 2001, except for the changes made.

____
SALLY OLINGER